Supreme Court, U.S.
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No. 95-428

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Colorado Court Of Appeals

BRIEF IN OPPOSITION OF RESPONDENT HOLY CROSS WILDERNESS DEFENSE FUND

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COUNTERSTATEMENT OF THE CASE

Holy Cross Wilderness Defense Fund adopts the counterstatement of its co-respondent, Eagle County.

REASONS FOR DENYING THE WRIT

Nothing impels this Court's review of the settled proposition that a political subdivision has no standing to sue the state which created it. The result below is consistent with the decisions of this Court and the Circuits. Further, this Court should follow its customary course of refraining from deciding standing issues when the petitioner cannot make a case that it is entitled to any relief on the merits, as is true here.

Nor should this Court grant *certiorari* to address the unpublished opinion of a state trial court on the issue of preemption. (The Colorado Court of Appeals did not deal with the issue.) Moreover, the petitioners did not appeal the trial court's ruling against them on this point and therefore cannot, consistent with 28 U.S.C. § 1257, present it to this Court.

I. PETITIONERS' CASE DOES NOT PROPERLY PRESENT THE ISSUE OF A MUNICIPALITY'S STANDING TO ASSERT A TAKING

A. The Colorado Courts Have Held, on Adequate and Independent State Law Grounds, that Petitioners Have Not Yet Suffered Any Undue Interference With Their Water Rights. This Court Should Decline to Exercise its *Certiorari* Jurisdiction to Offer What Amounts to an Advisory Opinion on Standing.

This Court should follow its customary course of refraining from deciding standing issues when the petitioner cannot make a case that it is entitled to any relief on the merits. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 89 (1970) (declining to decide whether jurisdiction existed when it was plain that petitioner had not established the elements of his case). In addition to holding that the Cities had no standing to bring their takings claim, both courts below found that no prohibition of the Cities' water project has in fact occurred. The Cities do not contest here the lower courts' ruling that there has been no undue interference with their water rights.

The district court found that while the County had decided to deny the Cities a permit for one particular design of their proposed water project, it most certainly had not decided against granting any permit whatsoever:

> The Court has previously found that the Cities stipulated that they did not wish the Board to consider alternatives to the submitted Application. Therefore, the Board did not determine that a permit for the Project would be denied

> under any circumstances. Consequently, the question of whether the Board has authority to deny the Permits categorically is not before the Court.

App. 186a. Thus, on the basis of the record before it, the district court could not find that a taking had occurred. To the contrary, the County left open the possibility that a permit would be granted under different circumstances.

Similarly, the Colorado Court of Appeals held that no prohibition of the Cities' water project or interference with their property rights had taken place.

> The cities claim that . . . the Board attempted to 'veto' the project by denying the permits. We reject the cities' contention . . .

App. 24a. Far from prohibiting the project and "taking" the cities' water rights, the County acceded to the cities' insistence that the scope of their permit application be strictly limited and rejected the Cities' take-it-or-leave-it application:

> At the insistence of the cities, the Board limited its consideration to the water project as proposed, and did not consider whether any alternative configurations could be designed which would meet the regulatory criteria. Although the permits for the project were denied, the cities are not prohibited from resubmitting the proposed project with changes or from submitting a different proposal. The cities have not demonstrated that such alternatives are unfeasible. . . . *We do not perceive any undue interference with the exercise of the cities' established water rights.*

App. 21a (emphasis added).

The law of standing, like the rules of basketball, proceeds on the common sense assumption of "no harm, no foul." *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (at an "irreducible minimum," article III requires a plaintiff to show injury in fact in order to invoke the jurisdiction of the court). In this case, both lower courts have found that no harm has occurred. Petitioners have not appealed the lower courts' rulings that there has been no interference with the cities' water rights. Where it is conceded that there has been no injury in fact, there can be no standing to allege what is only a phantom injury.

The Cities might argue that their harm consists of not being permitted to build their water project exactly as they choose. But the Colorado Court of Appeals disposed of this argument, too, squarely holding on an adequate and independent state law ground that the Cities' water right "should not be understood to carry with it absolute rights to build and operate any particular water diversion project." App. 21a (citation omitted) (rejecting Cities' state law claim that the County's regulatory action in this case prevents them from exercising their water rights). The court upheld the County's right to regulate the manner in which the Cities exercise their water rights, which may still be developed under alternative scenarios. App. 20a-21a.

The lower court's decision on this point accords with the treatment that this Court has extended to the same proposition of law. In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 (1986), this Court was unable to conclude that a taking had occurred where "the

holdings of both courts below leave open the possibility that some development will be permitted." Here, as in *County of Yolo*, the lower courts' findings that other development plans may be accepted transforms the case into one in which no takings issue is present. 477 U.S. at 353, n.9.

This is a case in which the lower courts agree that no harm has been done, petitioners themselves have dropped that claim, and other avenues remain open to petitioners to obtain the necessary permit. This Court should not make the extraordinary step of accepting *certiorari* jurisdiction over a case in this posture.

B. The Circuits Are in Agreement With Each Other and With This Court on the Proposition that Municipalities Cannot Assert a Taking Against the State.

Petitioners labor to create the appearance of a conflict on this issue, but no conflict actually exists. A long and consistent line of the decisions of this Court holds that a state entity such as a municipal corporation cannot assert a Fifth Amendment takings claim against its creator, the state. *Coleman v. Miller*, 307 U.S. 433, 441 (1939) ("Being but creatures of the State, municipal corporations have no standing to invoke the Contract Clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator"); *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the

will of its creator"); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 188 (1923) (In no case "was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This Court has never held that these subdivisions may invoke such restraints upon the power of the State"); *City of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923) ("The city cannot invoke the protection of the Fourteenth Amendment against the State"); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-179 (1907) ("[T]he state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States"); *New Orleans v. New Orleans Water Works*, 142 U.S. 79, 89 (1891) ("[T]he city, being a municipal corporation and the creature of the state legislature, does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed or even abolished at the will of the legislature").

Universally, the courts of appeals which have reached the merits of this issue have followed this line of authority and reiterated its rationale: a political subdivision cannot lodge constitutional complaints against its creating state. *Housing Auth. of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1188 (10th Cir. 1991), *cert. denied*, 504 U.S. 912 (1991); *Board of Levee Commissioners of the Orleans Levee Board v. Huls*, 852 F.2d 140, 143 (5th Cir. 1988); *United States v. Alabama*, 791 F.2d 1450, 1456 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986); *Village of Arlington Heights v. Regional Transportation Authority*, 653

F.2d 1149 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973), *cert. denied*, 412 U.S. 950 (1973).

The Cities rely heavily on two cases from the Fourth and Fifth Circuits (*City of Charleston v. Public Service Comm'n of W.Va.*, 57 F.3d 385 (4th Cir. 1995) and *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979)) as supposed evidence of a conflict. Neither case contains a ruling on the merits of whether a political subdivision may sue its state for a taking. In *Charleston*, the Fourth Circuit ducked the question of whether the city had standing to assert a claim under the contracts clause, ultimately concluding that "we need not resolve this troublesome question because even if the cities have standing to maintain this action, their claim clearly fails on the merits." 57 F.3d at 390. *Rogers* addressed the quite distinct issue of a political subdivision's standing to challenge a state statute under the federal supremacy clause. When the Fifth Circuit discarded *Rogers* with its decision in *Board of Levee Comm'rs, supra*, it pointed out that *Rogers* contained mere *dicta* on the takings issue, because *Rogers* "dealt only with the *theoretical possibility* that a city has standing to sue its state." 852 F.2d at 143 (emphasis added). Therefore, neither *Charleston* nor *Rogers* helps the Cities create a conflict.

Nor do the cases from the Delaware and Pennsylvania Supreme Courts create a "conflict" requiring resolution; the Cities misuse them. *New Castle County School Dist. v. State*, 424 A.2d 15 (Del. 1980) was simply not a

standing case. Ruling on certified questions of law, the Delaware Supreme Court found not unconstitutional a state statute which directed a school district to convey real property for only nominal value. Neither the word "standing" nor the municipal standing doctrine appears anywhere in the opinion; again, the court merely assumed the existence of standing. Finally, the Pennsylvania Supreme Court case cited by the Cities held only that "the *Pennsylvania Constitution* does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken," and is therefore inapplicable to the Fifth Amendment claim asserted here. *City of Chester v. Commonwealth Dept. of Trans.*, 434 A.2d 695 (Pa. 1981) (emphasis added).

II. PETITIONERS HAVE FAILED TO PROPERLY RAISE A FEDERAL QUESTION OR SUBSTANTIAL FEDERAL ISSUES WITH RESPECT TO THEIR PREEMPTION CLAIM

A. Petitioners Provide No Basis for This Court's Review Under 28 U.S.C. § 1257, Because They Failed to Raise the Question of Federal Preemption in the Colorado Court of Appeals. Thus, the Question Cannot be Presented to This Court.

Eagle County denied the Cities a land use permit on numerous grounds, finding that the Cities' application contained multiple violations of County regulations. App. 3a. Ruling upon the Cities' subsequent claim that federal law preempted the County's permit decision, the district court upheld the grounds pertaining to wetlands and nuisance factors and found the remainder preempted. *Id.*

What happened next is dispositive of the Cities' assertion of jurisdiction here: Although Holy Cross Wilderness Defense Fund and the County appealed the district court's affirmative finding of partial preemption, App. 241a, the Cities failed to cross-appeal the district court's ruling that the wetlands and nuisance grounds for denial were not preempted. App. 243a. Notably, all the Cities can do now is to point to the *County's* notice of appeal raising the partial finding of preemption, App. 241a – that is, the issue that was decided in the Cities' favor. As we showed above, the Wilderness Defense Fund and the County appealed the issue which was the converse of the Cities' complaint; the Cities simply waived their issue. Accordingly, the Cities fail to meet their mandatory jurisdictional burden of showing that they "pressed the issue" that certain grounds for denial were *not* preempted.

Because violation of County regulations on any single ground supplied an adequate basis for the County's denial of the permit, App. 6a, the decision below rests upon a Colorado district court holding which was never appealed and cannot, consistent with 28 U.S.C. § 1257, now be considered by this Court. Holy Cross Wilderness Defense Fund incorporates by reference the further discussion of this point in Eagle County's Brief in Opposition.

The Cities did appeal to the Colorado Court of Appeals on the state law issue of the County's authority under Colorado statute to enact and apply the regulations under which it acted upon the Cities' permit application. App. 8a-9a. The Court of Appeals resolved that claim on adequate and independent state grounds not relevant here. The Cities cannot create *certiorari* jurisdiction by

bootstrapping their federal preemption issue to this different, state law claim. The Cities simply have lost the opportunity to present this issue to this Court by their failure to press and present it below.

B. Both Courts Below Have Found that No Prohibition of the Petitioners' Water Project Has in Fact Occurred. The Question of Federal Preemption is Not Properly Before this Court Until Such Time as an Actual Prohibition Has Occurred.

Even if the Cities had properly preserved this issue for review, it still is not ripe for resolution by this Court. A preemption claim arises when a party contends that it is subject to conflicting state and federal actions. *See California Coastal Comm'n v. Granite Rock Mining Co.*, 480 U.S. 572, 594 (1987) ("traditional preemption analysis . . . requires an actual conflict between state and federal law, or a congressional expression of intent to preempt"). Here, the Cities assert that the County has taken its water rights because the County has denied a permit for one of the various alternative designs of their water project. The courts below have expressly found that the County's decision does not amount to a prohibition of a water project authorized by federal action, however, as we discussed in section I.A of this brief. Rather, as the Colorado Court of Appeals pointed out to the Cities, they may repair their application and resubmit it to the County or apply for a permit for an alternative project configuration. The Court of Appeals found no interference with the Cities' water rights, App. 21a, a substantive holding that the Colorado Supreme Court left undisturbed. App. 215a.

Until such time as a lower court finds in the first instance that the County has actually prohibited the exercise of a right, and that the prohibition conflicts with an action of the federal government, there is no genuine claim of preemption. Because the County has left the door open to granting the Cities a permit, the Cities' preemption claim is not properly presented and does not merit review by this Court.

C. There is No Extraordinary Reason for this Court to Address the Unpublished Decision of a State District Court Concerning Preemption. There is No Conflict Between the Circuits or With Prior Decisions of this Court.

Even if there were a prohibition of the Cities' water project, and even if the Cities had properly preserved the preemption issue for review in this Court, this case still would not merit review on *certiorari*. The only ruling on the preemption issue in this case came in the district court; the word "preempted" appears in the decision of the Colorado Court of Appeals only to refer to the factual findings of the lower court (*see* section II.A, above). The Court of Appeals' decision simply does not stand for any proposition in the law of preemption which this Court could meaningfully address; not a single preemption case is cited in the opinion. This Court's *certiorari* jurisdiction does not exist to clarify the unpublished pronouncements of the state trial courts.

Further, preemption is a question of Congressional intent and therefore is largely a matter of construction of the particular statute involved in a given case. *See* L.

Tribe, *American Constitutional Law* § 6-25 (2d. ed. 1988). The Cities build their allegations of a conflict on two cases in which the plaintiffs' federal interests accrued under different statutes than the two involved here. (In this case, the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1995) and the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1995) establish the scope of, and limitations on, the Cities' interests).

The Cities ignore the statute-specific nature of pre-emption analysis when they cite *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980), which relied on the structure and purpose of the Mineral Leasing Act to find that that law held no role for state or local government decisionmaking. The Cities would have done well to look at a later Ninth Circuit decision, *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988), which holds that the Clean Water Act expressly reserves state and local regulatory jurisdiction. 841 F.2d at 934-5.

Finally, the Cities inexplicably use *California Coastal Comm'n v. Granite Rock Mining Co., supra*, a case under the Mining Law of 1872, as part of their "conflicts" argument. Because *Granite Rock* affirmed a state's right to impose environmental regulations in the mining context, however, *id.* at 594, the best use the Cities can make of it is to allege that the decision below runs afoul of a dissenting opinion. *See* Cities' Petition at 17. This does not come close to creating a conflict, however, or to providing a reason for this Court to grant *certiorari*.

As the County explains in its Brief in Opposition, both of the statutes which apply in this case contain anti-

preemption clauses which contemplate coincident compliance with state and local regulations. The result below is consistent with those statutes and with the caselaw interpreting them. And, as we have shown, the decision of the Colorado Court of Appeals is not inconsistent with either of the two cases to which the Cities try to contrast it. Accordingly, the conflict the Cities complain about is purely illusory.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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